

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHNNIE ELMEASE MADRIGAN, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal From the United States District Court for the
Northern District of California

BRIEF AND APPENDIX FOR APPELLEE

GEORGE COCHRAN DOUB,
Assistant Attorney General,

ROBERT H. SCHNACKE,
United States Attorney,

MORTON HOLLANDER,
JOHN G. LAUGHLIN,

Attorneys,
Department of Justice,
Washington 25, D. C.

MAR 31 1959

PAUL P. O'BRIEN, CLERK

INDEX

	Page
Counterstatement of the case	1
Argument	5
A. The District Court correctly found that Mrs. Madrigan's lung condition in 1951 was not related to her tubercular condition in 1955	6
B. The District Court's finding that Government personnel were not negligent in 1951 is clearly correct	19
Conclusion	28
Appendix	1a

CITATIONS

CASES:

<i>Bruce v. United States</i> , 167 F. Supp. 579 (D. Cal.)	6
<i>Costa v. Regents of University of California</i> , 116 Cal. App. 2d 445, 254 P. 2d 85	5
<i>Eastern Air Lines v. United States</i> , 221 F. 2d 62 (C.A.D.C.), affirmed <i>sub nom.</i> , <i>United States v. Union Trust Co.</i> , 350 U.S. 907	5
<i>Hennessey v. United States</i> , 242 F. 2d 381 (C.A. 9)	6, 7
<i>Lawless v. Calaway</i> , 24 Cal. 2d 81, 147 P. 2d 604	5, 23
<i>Local Union 6068 of United Mine Workers v. Bizzell</i> , 257 S.W. 2d 527 (Ky.)	26
<i>Miles v. Harris</i> , 194 S.W. 839 (Civ. App. Tex.)	26
<i>Pool v. Commissioner of Internal Revenue</i> , 251 F. 2d 233 (C.A. 9)	6, 28
<i>Ries v. Reinard</i> , 47 Cal. App. 2d 116, P. 2d 386	5
<i>Sim v. Weeks</i> , 7 Cal. App. 2d 28, 45 P. 2d 350	5
<i>Urrutia v. Patino, et al.</i> , 297 S.W. 2d 512 (Civ. App. Tex.) ..	26

STATUTES:

28 U.S.C. 1346(b)	2, 5
28 U.S.C. 2401(b)	5
28 U.S.C. 2671 <i>et seq.</i>	2, 5
28 U.S.C. 2674	5

MISCELLANEOUS:

41 Am. Jur., Physicians and Surgeons, Section 82	5
70 C.J.S., Physicians and Surgeons, Section 41	5
Federal Rules of Civil Procedure, Rule 52(a)	6

IN THE
United States Court of Appeals
For the Ninth Circuit

No. 16111

JOHNNIE ELMEASE MADRIGAN, ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal From the United States District Court for the
Northern District of California

BRIEF AND APPENDIX FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from a judgment of the District Court (Judge Ritter of Utah sitting specially), denying appellants' claims against the United States under the Federal Tort Claims Act. The pertinent facts, as found by the trial court, are summarized below.

On May 13, 1955, Johnnie Elmease Madrigan, as the dependant wife of Commander Fred J. Madrigan, was admitted to a United States Naval Hospital in Japan. Subsequent medical diagnosis of Mrs. Madrigan disclosed that she had "tuberculosis, pulmonary, bilateral, active [and] for advanced (App. 4a).¹

¹ In absence of a printed record, for convenient reference, we have set out as an Appendix to this Brief (pp. 1a-19a) the Findings of Fact and Conclusions of Law and Judgment filed by the District Court and the courts oral opinion which appears at pages 833-848 of the Reporter's transcript of the trial proceedings.

Based upon events which transpired in 1951 and which allegedly disclosed negligence by medical personnel in the Naval Hospital in California, this suit was brought by Mrs. Madrigan, under the Federal Tort Claims Act² in an attempt to fasten the United States with tort liability for her tubercular condition.³

On October 12, 1951, Mrs. Madrigan reported as an out-patient to the out-patient clinic of the United States Naval Hospital at Oakland, California. Her complaints on October 12, 1951 were "of very painful feet and fatigue" (App. 2a). Mrs. Madrigan was examined by Dr. Robert F. Christoph, a naval medical officer, who gave a diagnosis of foot deformity known as "hallux valgus" and referred Mrs. Madrigan to the orthopedic section of the out-patient clinic (App. 2a).

Mrs. Madrigan was seen on October 24, 1951, as an out-patient by Dr. Charles A. Mead, an orthopedist at the Naval Hospital clinic. Dr. Mead noted certain deformities in Mrs. Madrigan's feet, recommended surgical operations on her feet, and directed Mrs. Madrigan to return to the clinic for a final decision on the proposed foot surgery (App. 2a). Because Dr. Mead thought Mrs. Madrigan might be admitted to the hospital for surgery, "a routine pre-operative chest x-ray" of Mrs. Madrigan was taken on October 24, 1951 (App. 2a).

On October 29, 1951, Mrs. Madrigan was seen, again as an out-patient, by Dr. Mead and Dr. Cruise, the

² 28 U.S.C. 1346(b) ; 28 U.S.C. 2671 *et seq.*

³ A companion suit by Commander Madrigan as guardian *ad litem* for the minor children, Robert E. and Patricia Ann Madrigan, was consolidated for all purposes by the District Court. A single judgment (App. 8a-9a) disposing of both suits was entered by the District Court.

Chief of Orthopedics at the hospital. At this consultation it was decided not to perform surgery at that time; that, instead, Mrs. Madrigan should try foot baths and massage for her feet and a change of shoes (App. 3a). Mrs. Madrigan was directed to return to the clinic in one month for a check on her progress (App. 3a). After the examination of October 29, Mrs. Madrigan never returned to the Naval Hospital at Oakland (App. 4a).

The chest x-ray of Mrs. Madrigan, taken on October 24, 1951, was read by Dr. Bulgrin, a radiologist, on November 8, 1951. The x-ray film and a copy of Dr. Bulgrin's report of his reading of the film, dated November 9, were placed in the x-ray film files of the hospital.⁴ The original of Dr. Bulgrin's report was, on or about November 9, 1951, placed in the out-patient file or jacket maintained at the hospital for Mrs. Madrigan (App. 3a). As to the x-ray of 1951, the district court found as follows (App. 4a):

11. The signs and shadows in said x-ray film which were the basis of said report of said radiologist [Dr. Bulgrin] and his reading, were vague, faint and indefinite, and were questionable and inclusive as evidence of any disease.

⁴Dr. Bulgrin's report reads in part as follows (App. 3a):
 "11-8-51 CHEST, PA—

On the left in the plane of the first two anterior inter-spaces and to a lesser extent in the apex there is fine spotting and semi-confluent infiltration which is not heavy. Its appearance suggests minimal fibrotic infiltration.

Elsewhere the lung fields show no infiltration and the heart and other structures are unremarkable.

IMPRESSION: Minimal fibrotic appearing infiltration left upper lung field. Acid fast re-infection etiology must be considered first. Activity by single film study is not likely, but serial films over a fairly prolonged period are necessary to evaluate activity from a radiographic standpoint."

It was not until after May 1955, following the diagnosis in Japan of her tubercular condition, that Mrs. Madrigan made any inquiry of the routine pre-operative chest x-ray of October 24, 1951 (App. 4a). With further reference to the 1951 x-ray, the court found (App. 6a) that "whatever * * * [Mrs.] Madrigan's chest or lung condition was in 1951, as reflected in said October 24, 1951 chest x-ray film, such condition was not related to * * * [Mrs.] Madrigan's far advanced, active, bilateral, pulmonary tuberculosis in Japan in May, 1955."

With respect to the operation of the Naval Hospital at Oakland, the court found that the hospital was "operated and maintained with that degree of skill and care and knowledge and prudence that is ordinarily possessed and reasonably exercised by professional men, members of the medical profession * * *" (App. 5a-6a). And with further reference to incidents which took place at the Naval Hospital in Oakland in 1951, the Court found that there was no causal connection between the disease and disabilities of Mrs. Madrigan in 1955 and the operation, routine, maintenance, activities, acts, or alleged omissions, of the hospital or its personnel (App. 6a). Finally, the court found that neither the disease, disability nor the damage sustained by Mrs. Madrigan was caused by or was the result of any negligence, carelessness, wrongful act or omission on the part of the Oakland Naval Hospital or employees (App.).

These findings were totally dispositive of the Madrigans' claims based, as they were, upon the 1951 x-ray and the operation and procedures of the Naval Hospital in 1951. Accordingly, the District Court concluded (App. 6a-7a) that there was no basis for im-

posing liability upon the United States and entered judgment for the United States (App. 8a-9a).⁵

ARGUMENT

The District Court Correctly Held That in the Circumstances of This Case There Is No Legal Basis for Imposing Tort Liability Upon the United States

These suits arise under the Federal Tort Claims Act (28 U.S.C. 1346(b); 2671 *et seq.*) and, in accordance with the terms of that Act, the liability, *vel non*, of the United States is controlled and measured by the law of California where, in 1951, the alleged negligence or malpractice of naval medical personnel occurred. 28 U.S.C. 1346(b); 2674. This legal principle was not an issue in the trial court nor is it an issue on this appeal;⁶ similarly, there was no issue below, nor is there in this Court, over the burden imposed by California law upon one who asserts a malpractice claim against a physician or surgeon.

The California law in this area is in accord with the general rule⁷ and has been frequently stated and applied: See, *e.g.*, *Lawless v. Calaway*, 24 Cal. 2d 81, 147 P. 2d 604; *Costa v. Regents of University of California*, 116 Cal. App. 2d 445, 254 P. 2d 85; *Ries v. Reinard*, 47 Cal. App. 2d 116, 117 P. 2d 386; *Sim v.*

⁵ This disposition of the case rendered it unnecessary for the District Court to consider or pass upon the Government's affirmative defense based upon the two year statutory limitation on tort actions in 28 U.S.C. 2401(b). In view of the plain correctness of the decision below on the merits we do not consider it necessary to press the point in this Court.

⁶ See, Appellants' Br. p. 13. *Eastern Air Lines v. United States*, 221 F. 2d 62 (C.A.D.C.), affirmed *sub nom.* *United States v. Union Trust Co.*, 350 U.S. 907.

⁷ 41 Am. Jur., *Physicians and Surgeons*, § 82; 70 C.J.S., *Physicians and Surgeons*, § 41.

Weeks, 7 Cal. App. 2d 28, 45 P. 2d 350; *Bruce v. United States*, 167 F. Supp. 579 (D. Cal.).

Stated generally, California requires that to sustain a suit for malpractice it must be proved that the injury, disease or disability was occasioned by the failure of medical personnel to exercise the degree of learning, diligence and skill ordinarily possessed by physicians and surgeons of good standing practicing in the same locality.

The judgment of the court below represents a proper application of this legal standard to the facts as determined by the trial judge. It is for this reason that the appeal in this case is necessarily directed to the factual findings of the trial court. And in view of the exclusively factual issues presented by the appeal it shall be our primary purpose to demonstrate that the critical findings of fact which underlay the judgment below are not "clearly erroneous" but are firmly grounded upon substantial evidence. For this reason, the findings should not be overturned and the judgment below, based on the findings, should be affirmed. Rule 52(a), Fed. Rules Civ. Proc.; *Pool v. Commissioner of Internal Revenue*, 251 F. 2d 233, 247 (C.A. 9); *Hennessey v. United States*, 242 F. 2d 381, 382 (C.A. 9).

A. The District Court Correctly Found That Mrs. Madrigan's Lung Condition in 1951 Was Not Related To Her Tubercular Condition in 1955.

With respect to the October 24, 1951 x-ray of Mrs. Madrigan's chest, the District Court found (App. 4a) that the signs and shadows in that x-ray film "were vague, faint and indefinite, and were questionable and inconclusive as evidence of any disease." In the teeth of this finding, appellants, in this Court, proceed on

the premise that, at this early date, Mrs. Madrigan was afflicted with tuberculosis and that her subsequent advanced tubercular condition in 1955 was proximately related to the alleged negligence of Government personnel in 1951 (Appellants' brief, pp. 17-19). We postpone for now our showing that the court's finding with respect to the controversial 1951 x-ray and the absence of negligence in 1951 are amply supported by substantial evidence and pass to what we consider an equally fundamental infirmity in appellants' case. For the district court found, as additional facts (App. p. 6a) that whatever Mrs. Madrigan's chest or lung condition was in 1951, as reflected in the October 24, 1951 chest x-ray film, her condition was *not related* to Mrs. Madrigan's far-advanced, active, bilateral, pulmonary tuberculosis diagnosed in Japan in May 1955 and that there was no causal relation between appellants' illness and the events which transpired in 1951 (App. 6a). These findings, we now show, are clearly correct and are sufficient to dispose of appellants' claims.

As is common in suits based upon medical malpractice, questions of fact almost inevitably must be resolved on the basis of expert medical testimony. See, *e.g.*, *Hennessey v. United States*, 242 F. 2d 381 (C.A. 9). This case is no exception. Both appellants and the United States presented to the trial court, members of the medical profession distinguished in the field of chest diseases. The principal witness for the Government was Dr. Horton Corwin Hinshaw. Following his graduation from the University of Pennsylvania Medical School in 1933, Dr. Hinshaw went directly to the Mayo Clinic where he remained until 1949, when he came to San Francisco where he pres-

ently resides. For fifteen years Dr. Hinshaw specialized in the field of chest diseases; he has taught in the School of Medicine, Stanford University, where he is Clinical Professor of Medicine and head of the Division of Chest Diseases in that University (Tr. 414-415). Dr. Hinshaw has published numerous papers in medical journals, co-authored a book on streptomycin in 1949,⁸ and co-authored a textbook on diseases of the chest in 1956. Dr. Hinshaw has been the president of the American Trudeau Society which is the medical section of the National Tuberculosis Association. He is a member of the Board of Directors of the National Tuberculosis Association of the State Tuberculosis Association and the San Francisco County Association (Tr. 416). He has served as a consultant to the Surgeon General of the Public Health Service for five years and at present is a consultant in tuberculosis to the State of California, Department of Public Health; he is also a consultant to Letterman Army Hospital, to the Naval Hospital at Oakland, California, and to the Parks Air Force Base Hospital (Tr. 416).

Dr. Hinshaw's qualifications as a medical expert in the field of tuberculosis are unquestionable. At the request of the United States Dr. Hinshaw reviewed the medical history of Mrs. Madrigan, conducted a physical examination of her, including an x-ray of her chest, and reviewed the medical records of previous examinations and x-rays in order to form an opinion as to the factors that may have been involved in the production of her illness diagnosed as tuberculosis in

⁸ Dr. Hinshaw and his associates were the first to use streptomycin in the treatment of tuberculosis, both in experimental animals and in human beings (Tr. 415-416).

1955. The medical history of Mrs. Madrigan, as obtained from medical records and from Mrs. Madrigan, as related by Dr. Hinshaw, is as follows:⁹

The records of the United States Naval Hospital, Portsmouth, Virginia, for 1948 and 1950, relate primarily to Mrs. Madrigan's two pregnancies and deliveries. In addition to the usual entries concerning her pregnancies and deliveries, there is mention of Mrs. Madrigan having complained of sinking attacks and of fainting. On one occasion there was a mention of pleurisy "which may or may not be related to her current illness." There was no evidence of any x-ray of her chest having been made prior to 1948 although x-ray films were available in connection with her pregnancy in 1948 and 1950. "There was one film dated August 30, 1948, which, in my opinion, was free of evidence of disease" (Tr. p. 418). A second film, dated March 10, 1950 "was reported negative, and may or may not be negative. There is a suggestion of some possible early disease. It could represent early tuberculosis at that time, although I doubt if I would have reported it as such if I had been inspecting that film at that time. Only in retrospect has that possibility occurred to me * * *" (Tr. p. 419). Medical records with respect to Mrs. Madrigan for 1948 reveal, additionally, that following her first pregnancy she left the hospital of her own will and "with the knowledge that her physicians considered it unwise for her to leave at that time" (Tr. p. 420).

Upon her arrival in California in 1951 Mrs. Madrigan was seen on several occasions in August and September at the out-patient clinic at the Alameda

⁹ See also the testimony of Dr. Shipman, presented as a witness for the United States (Tr. 376-411).

Naval Air Station. The records there reveal that her first complaint, on August 31, 1951, was of dizzy spells and of fainting (Tr. p. 418). At that time an effort was made to find out why she was feeling dizzy and faint. "It was mentioned that she had had a miscarriage some three months previously and had been feeling weak since that date. It was suspected that she might be anemic, [but] her blood count was approximately normal. She had 75 percent hemoglobin. We ordinarily consider 80 percent to be normal for women. So is was slightly below normal" (Tr. pp. 420-421). On September 4, 1951, Mrs. Madrigan was given a prescription for iron and vitamins and was advised to return in one month.

On October 12, 1951, Mrs. Madrigan was referred to the orthopedic department of the Naval Hospital at Oakland, California. The entry on that date indicates that she was suffering from very painful feet. The orthopedic consultant, who examined Mrs. Madrigan, Dr. Mead, thought that the bunion deformity (hallux valgus) which he found was sufficient to justify an operation to relieve her painful condition. There is a further notation, on October 12, 1951, that Mrs. Madrigan wished to have both feet operated on at the same time and signed a form giving permission to have the operation performed. Dr. Mead, however, wished to have the Chief of Orthopedics, Dr. Cruise, see Mrs. Madrigan and help determine what type of operation, if any, should be done (Tr. p. 421). On October 24 while awaiting the consultation with the Chief of Orthopedics, Dr. Mead sent Mrs. Madrigan to have x-ray examinations made of her feet and a "routine pre-operative chest" x-ray examination.

Mrs. Madrigan was seen by the Chief of Orthopedics

on October 29, 1951, whereupon it was decided not to operate at that time. She was, instead, instructed, first, "to treat her feet with contrast baths twice a day, with foot massage twice a day. She was given advice with respect to the type of shoes she should wear, *and was instructed to return in one month, for a check on her progress*" (Tr. pp. 423-424) (Emphasis added). Contrary to her doctor's instruction to return in one month, Dr. Hinshaw "found no record that Mrs. Madrigan did return in one month, or, indeed, at any other time, to Oakland Naval Hospital until 1955, when she came back from Japan" (Tr. p. 424). Mrs. Madrigan did, however, tell Dr. Hinshaw that she attended the out-patient clinic at Alameda in December, 1951 when she had symptoms of sinusitis and an x-ray of her sinuses at that time disclosed evidence of sinusitis. She was given a series of penicillin injections and apparently there was no other indication of disorder along that line (Tr. p. 424).

A clinical notation made on May 12, 1952, discloses that Mrs. Madrigan was given a prescription for a drug known as Texamyl. This drug is frequently given to people who are depressed and emotionally disturbed, and "sometimes is given in connection with the treatment of alcoholism, although there is no record that she had any problem with alcoholism at that time" (Tr. p. 424).

Continuing with his narration of Mrs. Madrigan's medical history, Dr. Hinshaw found the next entry under date of April 16, 1953, where the statement appears, "Possible anemia and nervousness." A blood count was done and the results were within normal limits (Tr. p. 426). With particular reference to the period commencing in 1948 through April 16, 1953

Dr. Hinshaw could find no entry in Mrs. Madrigan's medical record "which would lead me to suspect active tuberculosis, and evidently the attending physicians, who must have had a much better insight into her problems at the time, did not order any x-rays or other examinations, which leads me to believe that they also did not regard any of her symptoms as indicative of tuberculosis" (Tr. p. 426).

Subsequent to April 16, 1953, Mrs. Madrigan was given a physical examination prior to her embarkation for Japan. There is no indication as to what this examination consisted of but it was evidently satisfactory inasmuch as the medical entry "is simply an O.K., a date, and the initials or signature" (Tr. p. 427). The next entry in Mrs. Madrigan's clinical record is of her admission to the United States hospital in Japan on March 16, 1954, where she remained until March 19, 1954. The record with respect to this hospitalization reveals that Mrs. Madrigan, prior to her admission, "had been drinking, consuming one-fifth gallon of whisky per day for several days previously; that she had been complaining of severe nervousness for the previous two years; and that her drinking had been because of her nervousness. She also had been vomiting excessively; * * * had been emotionally disturbed;" (Tr. p. 428). Mrs. Madrigan was treated with vitamins, a diet and when she left the hospital on March 19 was very much improved. On October 14, 1954, Mrs. Madrigan was again admitted to the hospital in Japan where she remained until October 20. The hospital record disclosed "that she and her husband had had frequent arguments over many years, and that during the one year that they had been overseas they had been constantly fighting between themselves

because of the patient's excessive drinking and because of her husband's alleged infidelity. The statement was also made that she had had frequent temper outbursts, a loud and obnoxious behavior, which had come to the attention of neighbors and administrative officials at the camp at Yokahama. Prior to entering the hospital [Mrs. Madrigan] had become very nauseated, and apparently she had eaten nothing for several days. The examiners reported her to be very much disturbed emotionally; that at the time [October 24, 1954] she had been hostile and antagonistic, and had uncontrolled temper outbursts" (Tr. pp. 428-429).

On November 10, 1954, Mrs. Madrigan was apparently seen as an out-patient at the hospital where the diagnosis was simply: "Entered as emotional instability reaction" (Tr. p. 429).

Mrs. Madrigan was admitted to the U. S. Naval Hospital No. 3293 in Japan on May 13, 1955 "because of excessive drinking, nervousness, emotional instability, and cough. She had lost weight. And again the entry is made that she had been consuming approximately one-fifth gallon of whisky daily. When she was examined at that time, and for the first time that I could find in her record, there were abnormal physical signs in her chest. * * * The physical examination of her chest suggested to the examiner that she might have an asthmatic condition, but X-ray examinations were ordered, and these showed a very extensive, what I would regard as an acute type of pulmonary tuberculosis" (Tr. pp. 429-430). At that time her sputum was found to contain tubercule bacilli, and Mrs. Madrigan's condition was recognized as a very acute, serious, pulmonary infection with tuberculosis" (Tr. p. 430).

Having reviewed Mrs. Madrigan's x-rays in May 1955, Dr. Hinshaw related that he agreed, with the radiologist who interpreted those x-rays, that Mrs. Madrigan at that time "had very extensive tuberculosis of an acute inflammatory type which involved nearly all portions of both lungs. The shadows were most dense at both apices, and there were probably multiple small cavities on both sides" (Tr. p. 431). The 1955 x-rays indicated "inflammation which involved essentially all portion of both lungs, most intense in the upper portion of each lung" (Tr. p. 440) and while "one could not say with absolute assurance that this was tuberculosis by looking at the x-ray, although [it was] surely very strongly suspicious of tuberculosis * * *" (Tr. p. 440). The signs and shadows present in the 1955 x-rays were described by Dr. Hinshaw "as acute. *By 'acute,' I mean of recent origin. One cannot always read the past in an x-ray film, but when one sees this type of shadow he is justified in saying that this is a disease of recent origin. Most of what we saw certainly had not been there many months previously, and possibly not many weeks previously*" (Emphasis added) (Tr. 441).

Dr. Hinshaw was thus of the opinion that on the basis of the x-ray evidence of Mrs. Madrigan's tubercular condition in 1955 her lung condition was of "recent origin * * * and had not been there many months previously and possibly not many weeks previously" (Tr. 441). Dr. Hinshaw found confirmation of this opinion in subsequent x-ray films taken of Mrs. Madrigan after her removal from Japan to Fitzsimmons Army Hospital, Denver, Colorado. Within several weeks following Mrs. Madrigan's diagnosis in May 1955 "there was a marked diminution in the

amount of inflammation''. This factor is significant, in the words of Dr. Hinshaw, "because we know that inflammation of recent origin also disappears much more rapidly and much more completely, so that at present [December 27, 1957, Mrs. Madrigan shows] essentially no inflammatory reaction and remarkably little scar tissue. If her disease had been present for a long time prior to the institution of treatment I would have anticipated seeing a great deal of scar tissue in the lungs at this time, whereas there is very little" (Tr. p. 441).

Dr. Hinshaw's opinion that Mrs. Madrigan's condition in 1955 was of "recent origin" was further confirmed by the "tuberculin inflammation of [Mrs. Madrigan's bronchia]" in May, 1955. (Tr. p. 441). In the words of Dr. Hinshaw tuberculin inflammation of the bronchia "is also indicative of a very acute disease. That is, when tuberculous ulceration of the bronchia—that is, ulcerative changes in the membrane which lines the air-conducting tubes—when that occurs there is often a rather rapid, almost explosive-like spread of the disease to many parts of the lung * * *" (Tr. p. 442). Still further confirmation of the "recent origin" of Mrs. Madrigan's tubercular condition in 1955 is found in the fact, relied upon by Dr. Hinshaw, that skin tests on Mrs. Madrigan's two children were performed "a few months" prior to May 1955 (Tr. p. 446). This fact is significant "because a tuberculous mother very readily transmits the disease to her children by the very nature of their intimate and oft repeated contact. It's quite unusual indeed to find a lady with tuberculosis whose children are tuberculin negative. * * * If she had had tuberculosis in an open form since 1951, I do not believe the children would

have had negative skin tests a few months prior to May 1955'' (Tr. 446).

Based upon the careful analysis and opinion of Dr. Hinshaw, a distinguished specialist in the field of chest diseases, there can we submit, be no serious question that the finding of the district court that Mrs. Madrigan's tubercular condition in 1955, was not related to her lung condition in 1951 whatever it may have been. And there is more to support this finding of the District Court. Again we draw upon the testimony of Dr. Hinshaw and quote from his relevant and instructive opinion as to the probable causes of the acute tubercular condition of Mrs. Madrigan in 1955 (Tr. pp .450-452) :

Well, as with every case of tuberculosis, there first must be the factor of infection. Where she acquired her infection and when, we have no idea. It is true that infection is much more readily acquired in the Orient than it is in this country, and it is possible she first acquired it over there. But I think it would be fruitless to attempt to guess where she first acquired her tuberculosis. We know the infection is acquired by essentially everyone who lives in the Orient for any length of time. It's acquired, was acquired, essentially by everyone in this country, perhaps, say, one or two generations ago. At present it is not nearly so prevalent. But the infection itself is not ordinarily manifested by disease; commonly tuberculosis enters the system, heals in the normal course of events partially but not totally, and then is reactivated at some later date as a result of environmental influences. That is why tuberculosis is so spoken of as a "social disease" or a "social disorder," and is why tuberculosis is so common in those countries where nutrition is poor and where

people work hard and don't get adequate rest and so on.

That is why tuberculosis is rare in this country, why it is common in the Orient, why it is common in Russia and other countries. When tuberculosis exists, we nearly always try to find out if we can what are the facts, why did this person become ill when other ones who became infected were not rendered ill and such things as child-bearing frequently enter into it with women—loss of sleep, overwork, malnutrition are very commonly an important factor, among underprivileged people, and those who have had bad nutritional habits. And one of the very common causes, one of the very common factors to which we attribute the breakdown of tuberculosis, is alcoholism.

I should say that in San Francisco Hospital, which of course does deal with a different class of society from that of Mrs. Madrigan, but nevertheless in San Francisco Hospital I should say that in the service that I have supervised there for the past seven or eight years, I should say 50% of our patients, or perhaps more, have an alcoholic history and have a connection between alcoholic excesses and specific, breakdown of tuberculosis prior to admission.

When I was consulting medical director to another institution, Weimar Chest Center, where we have five or six hundred admissions a year,—again these are patients of the indigent class; nevertheless, alcoholism enters in very frequently as a cause of acute flareup of pulmonary tuberculosis.

It is my opinion that in Mrs. Madrigan's case, she might well have remained well, she might well have escaped what she has gone through, if she had been of more temperate habit. I think it's not alone the alcohol per se, it is also the starvation and malnutrition that such people impose

upon themselves. Many have the feeling that the emotional factors, in themselves, quite independent of any toxic material or malnutrition, may affect the progress of tuberculosis unfavorably. The mechanism of that is perhaps along the line of the cortisone drugs, which are definitely more likely to be in quantity in the body following emotional crises. And very often pulmonary tuberculosis seems to be the result of the emotional crises' even when alcoholism and malnutrition do not enter.

So I would sum it up by saying that I think her intemperate habits and her emotional problems, her misfortunes, were the most important causes of her tuberculosis.

By way of summation then, the evidentiary facts supporting the District Court's finding that Mrs. Madrigan's tubercular condition in 1955 was of "recent origin" and therefore not related to her lung condition in 1951, whatever it may have been, as reflected in the 1951 x-ray, as follows: (1) the medical history of Mrs. Madrigan prior to 1955 does not reflect symptoms which would lead one to suspect that she had tuberculosis; (2) Mrs. Madrigan's diagnosis of tuberculosis took place in the Orient where tuberculosis is common and infection is acquired by essentially everyone who lives in the Orient for any length of time (Tr. 450); (3) Mrs. Madrigan's excessive consumption of alcohol and the concomitant of alcoholism, malnutrition, were evident while she was in Japan and immediately preceding her diagnosis of tuberculosis; (4) Mrs. Madrigan, immediately prior to her diagnosis, had been beset with emotional problems and domestic difficulties which were symptomatic of either or both her alcoholism and her husband's asserted in-

fidelity; (5) Mrs. Madrigan's tuberculosis was "acute" when diagnosed in May 1955 and, following treatment the inflammation disappeared rapidly and left very little scar tissue; and (6) the skin tests of Mrs. Madrigan's children, a few months prior to May 1955, were tuberculosis "negative" although a "tuberculin mother readily transmits the disease to her children by the very nature of their intimate and oft repeated contact" (Tr. 446).

B. The District Court's Finding That Government Personnel Were Not Negligent in 1951 Is Clearly Correct.

1. Appellants' claims turn upon events which transpired at the out-patient clinic of the Naval hospital in Oakland, California, in 1951. With respect to these events and to the action of medical personnel, the district Court found (App. 5a-6a):

[That] there was no negligence, or carelessness, and no wrongful act, or omission on the part of defendant the United States of America or its employees, * * * and at all times pertinent to the issues herein said United States Naval Hospital at Oakland, California, was operated and maintained with that degree of skill and care and knowledge and prudence that is ordinarily possessed and reasonably exercised by professional men, members of the medical profession, under all the circumstances of this case.

By way of attack upon this finding, appellants point to the controversial x-ray of Mrs. Madrigan's chest taken in 1951 and argue that by any reasonable standard of good medical practice, that x-ray should have been in her jacket when she arrived for surgery on October 29, 1951 (App. Brief, p. 21). This argument is based on the supposition that Mrs. Madri-

gan, in 1951, was, at that time, afflicted with tuberculosis, either active or inactive, and that the 1951 x-ray is conclusive evidence of this asserted fact. With respect to the x-ray the District Court found, however, that (App. 4a) "the signs and shadows in said x-ray film which were the basis of said report of said radiologist in his said reading, were vague, faint and indefinite, and were questionable and inconclusive evidence of any disease."

With wisdom born largely of hindsight there was opinion testimony by competent medical personnel that the 1951 x-ray was indicative of active or incipient tuberculosis and that Mrs. Madrigan's condition in 1955 was the culmination of a progressive disease. Such testimony does not impair the finding of the trial court, however, much less permit it to be set aside, for as we have shown there is opinion testimony that her condition in 1955 was of recent origin. Additionally, it is a fact that is not subject to dispute that no one will ever know with any degree of certainty what the true state of Mrs. Madrigan's lung condition was in 1951, nor can there be any dispute that it is virtually impossible to diagnose the disease of tuberculosis on the basis of a single x-ray (Tr. 389). In this regard, we point out that even in 1955 when Mrs. Madrigan's tuberculous condition was diagnosed, the diagnosis could not be made on the basis of her x-rays alone but was conclusively established only after a sputum test revealed the presence of tubercule bacilli (Tr. p. 430).

Neither is the finding of the trial court impeached because the radiologist who read the 1951 x-ray was of the opinion that the signs and shadows might be indicative of "acid fast re-infection etiology"—in

medical parlance, tuberculosis—which must be “considered first” (App. 3a). Nor to support the finding is it necessary to impeach the radiologist’s report. On the contrary, all medical experts in the court below were of the view that the 1951 x-ray was competently read and reported. Thus, Dr. Hinshaw testified that in the x-rays “there are shadows, again very faint, and some detectable, strand-like shadows more indicative of a scarring process than that of an inflammatory process” (Tr. 538). “What we are seeing there [in the x-ray], * * * is the result of infection rather than the inflammatory reaction itself. *A scarring process refers to the result of an infection rather than the infection itself*, and it may well have been healed and it may well have not been. There is no way of knowing. * * * It could have been active or it could have been inactive” (Tr. pp. 538-539).

Even had there been an active infection in 1951, “in the normal course of events * * * if you had 100 patients, let us say, with shadows comparable to this, that of those 100 maybe 95—a large proportion of them—would never have come to any recognizable disease. We see scars and even calcified areas of healed tuberculosis in the chest x-rays of thousands of people who have never known themselves to be ill, who must have had this much or more disease at some remote period. That is why I emphasized * * * the environmental factor. What were the factors which caused her infection to become active and symptomatic and devastating—appearing as it did in 1955 * * * The normal course of events would be for it [the pathology] to heal if she were living under good conditions” (Tr. pp. 538-539).

The predicate for appellants' claims—that Mrs. Madrigan had active or incipient tuberculosis in 1951—is necessarily based upon conjecture. Not only is it questionable that the “signs and shadows” disclosed by the 1951 x-ray were present because of a tuberculosis infection but even if she were tubercular at that time, it is questionable whether the evidence was of active tuberculosis or whether it was evidence of a prior infection that had subsequently healed. In short, the signs and shadows, as the District Court found, were questionable and inconclusive of any disease. And the speculative nature of these claims is the more apparent in the light of the fact that the signs and shadows present in the x-ray could as well be attributable to “some acute, transient, infection related to [Mrs. Madrigan’s] sinusitis, for example. It is possible that it might have been some fungus infection, a coccidioidomycosis, which is common in parts of California, * * * [produces] shadows, [Tr. pp. 437-438] * * * and is a frequent cause of mis-diagnosis” (Tr. p. 439). Moreover, “it is not infrequent that patients develop shadows of this sort presumably due to viral infections * * * which will often disappear without ever knowing what they were” (Tr. pp. 439-444).

And the possibility cannot be “excluded” that the signs and shadows in the 1951 x-ray were the result of artifacts, meaning that they were produced by some “artificial, external condition” (Tr. p. 548). Dr. Hinshaw has seen “shadows before precisely like those [in the 1951 x-ray] cast by braids of hair, * * * parts of clothing—a silk handkerchief * * * has created a shadow that was all for the world like a serious-looking area of disease” (Tr. p. 549). It is not of

course essential that the signs and shadows in the 1951 x-ray were attributable to a factor other than tuberculosis; all that need be shown is, as we have done, that the record is replete with substantial evidence supporting the District Court's finding that the signs and shadows in the x-ray were "questionable and inconclusive as evidence of any disease" (App. 4a).

2. In finding that medical personnel at the Naval Hospital in Oakland were not negligent in 1951, the District Court assayed their conduct in the light of the degree of learning, diligence and skill ordinarily possessed by physicians and surgeons of good standing practicing in the San Francisco area. *Lawless v. Calaway*, 24 Cal. 2d 81, 86, 147 P. 2d 604. In weighing the correctness of the finding that Government personnel were not negligent it must be remembered that the 1951 x-ray of Mrs. Madrigan's chest was not taken because she was complaining of a respiratory ailment. Rather, her complaint in 1951, when she presented herself to the out-patient clinic, was of a foot condition, hallux valgus—bunion growths which were so extensive that the examining orthopedist, Dr. Mead, recommended that surgery be performed. The x-ray which he ordered was a "pre-operative chest x-ray", a routine hospital procedure. Surgery, however, was never performed upon Mrs. Madrigan because the Chief of Orthopedics, Dr. Cruise, on examining Mrs. Madrigan, was of the view that her condition could be corrected by less drastic measures. There was, therefore, no necessity and no occasion for the "routine pre-operative chest x-ray" ever to come to the attention of Dr. Mead or his superior, Dr. Cruise; and, insofar as appears, the x-ray was not, in fact, seen by any doctor other than the radiologist who read the x-ray until

appellants dug the x-ray out of the hospital files some four years later.

In these circumstances, there is no basis whatever for charging either Dr. Mead or Dr. Cruise with malpractice because follow up measures with respect to the x-ray were not taken; and no criticism can validly be directed at Dr. Bulgrin, the radiologist, because his only job and his only responsibility was to read the x-ray and it is agreed that this job he did with complete competence (App. 14a-15a).

Neither can it be said that the operating routine at the Naval hospital provides a basis upon which to sustain these claims. Mrs. Madrigan was instructed by her physician, on October 29, 1951, to return to the out-patient clinic in one month in order to ascertain whether the corrective measures, short of surgery, were remedying the condition of her feet. The x-ray of Mrs. Madrigan's chest was read on November 8 and Dr. Bulgrin's report was typed on November 9, 1951. The x-ray and the report, in due course, found their way to the jacket maintained for Mrs. Madrigan at the clinic. Had she complied with her physician's instruction and returned to the clinic within a month or even later, the radiologist's report on the chest x-ray would, presumably, have then come to the attention of a physician whereupon the follow-up measures which everyone agrees were warranted by the x-ray, would, presumably, have been taken (Tr. 399).

The manner in which the out-patient clinic was conducted, with particular reference to the x-ray procedures, in no way departs from the procedures followed in clinics of comparable institutions in the San Francisco area. Dr. Hinshaw is chief of the chest out-patient clinic at Stanford Hospital and is familiar

with the chest clinic at San Francisco Hospital and has worked in some other institutions. Dr. Hinshaw was asked by the court (Tr. p. 459), "What is the ordinary and usual business and professional practice of hospitals and hospital personnel and doctors, experts in your field, such as you are, and with out-patient and in-patients and so on with respect to those matters." Dr. Hinshaw answered as follows (Tr. 459) :

My knowledge of Oak Knoll Naval Hospital is based upon the fact that I go over on the first and third Wednesdays of each month and consult with the physicians there concerning special problems, usually perplexing problems relating to lung disease and very often based upon x-ray findings. These are ordinarily, although not invariably, in-patients rather than out-patients. I have observed, though, that the personnel in the hospital—and I am reasonably sure in the out-patient department also—changes frequently, and that everything is entered in the record, so that a continuation of responsibility from one man to another is achieved by reference to the record. And one who does not have the record in hand is almost hopelessly ignorant of that particular patient. You might say the same thing applies to out-patient departments elsewhere, such as Stanford Hospital. I will see the patient one day, perhaps someone may see him next time, and each time we try to enter it in the record. And if the patient does not return, the record is not recalled and there is no way of determining what may have happened during the patient's absence. If the patient is directed to return, it is anticipated of course that when that patient does return, everything will be brought up-to-date, brought together, and the patient will be informed of what needs to be done. If the patient fails to return, then those

things may well be lost through observation, like it was in this woman's case.

*It is my opinion that her failure to be informed, assuming that her memory is correct and she was not informed, was due to the fact that she never returned to the place where that information was placed. Her subsequent visits were to a different institution (Emphasis added).*¹⁰

There can, we submit, be no serious question that the findings of fact of the District Court in this case are supported by substantial evidence. We have, moreover, through the District Court's opinion, the benefit of some of the considerations which he took into account in making his findings. Thus, his opinion reveals with marked clarity that not the least factor underlying his findings was the demeanor and stature of the professional men who were before the court. Thus, with respect to Dr. Hinshaw, the court said: (App. 10a):

“[he] had the bearing and demeanor of a scientist and in what he said, he expressed himself with careful attention to detail and the thoughtful attention to his phrases, to their meaning and extent. Now, without casting any uncomplimentary suggestion upon Dr. Bulgrin, I suggest to you that the testimony of Dr. Hinshaw in my judgment is the more credible.”

¹⁰ A serviceman's dependent is not, of course, subject to military discipline and there is no more an obligation upon medical personnel of the services to pursue a patient than there is upon a private physician or surgeon. *Urrutia v. Patino, et al.*, 297 S.W. 2d 512, 516 (Civ. App. Tex.); *Local Union 6068 of United Mine Workers v. Bizzell*, 257 S.W. 2d 527 (Ky.); and *Miles v. Harris*, 194 S.W. 839, 844 (Civ. App. Tex.).

With reference to Dr. Bulgrin the court said (App. 9a-10a) :

Now, to start out with, I am going to pay a little attention to Dr. Bulgrin. And that statement of his that the chances were overwhelming that Mrs. Madrigan had tuberculosis in the upper left lobe of that lung on October 24, 1951.

Now, one of the jobs of the trial judge is to pass upon the credibility of the witnesses and what they say. And I suggest to you that at the time Dr. Bulgrin said what he did about "overwhelming," I was sitting here with my eye on him, watching him. And Dr. Bulgrin relaxed, slumped down in his chair; it was the tale end of something he had been talking about, his attitude and manner of speech were such, and the character of his statement was such, that it seemed to me that that was a rather careless thing for a well-trained, experienced doctor to say. * * *

And the court observed that (App. 18a-19a) :

"* * * it is interesting to observe here that it is the younger ones, the least experienced, and those who haven't yet developed a very high degree of care in their observations and statements, who go the farthest in this record. Hinshaw and Shipman seem to me to come very close to stating just about all one can state concerning this evidence. I prefer to take the view that the credibility of Dr. Hinshaw's testimony here is to be preferred to the credibility of Kruisheer, the credibility of Bulgrin and the credibility of Dr. Wilson.

"Dr. Wilson is a splendid man, but he is a young man. He has a wonderfully fine educational background and a good deal of experience, but I was of the opinion and am now that Dr. Wilson made of himself something of an advocate in this case,

and I don't suggest anything uncomplimentary to him or to counsel in that connection. He was just very enthusiastic about those films of his. * * *"

As this Court pointed out in *Pool v. Commissioner of Internal Revenue*, 251 F. 2d 233, 247, "The trier of fact may disregard uncontradicted testimony, if it is improbable. What is more important, he may make his own inferences from the demeanor of the witnesses' which is 'always assumed to be in evidence'."¹¹ In the circumstances of this case, turning as it does upon expert medical testimony, in some respects on conflicting testimony, particular deference is to be accorded the trier of fact. For this additional reason the findings should not be disturbed.

¹¹ "Wigmore on Evidence, 3rd ed., 1940, Vol. III, § 946, p. 498. The late Judge Jerome Frank of the Court of Appeals for the Second Circuit has written what has become almost a classic comment on the significance of the demeanor of an orally-testifying witness as expressed in the brief statement quoted in the text from Wigmore:

'It is 'wordless language.' The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the trial court by his manner, his intonations, his grimaces, his gestures, and the like—all matters which 'cold print does not preserve' and which constitute 'lost evidence' so far as an upper court is concerned. For such a court, it has been said, even if it were called a 'rehearing court,' is not a 'reseeing court.' Only were we to have 'talking movies' of trials could it be otherwise. A 'steno-graphic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried'. It resembles a pressed flower. The witness' demeanor, not apparent in the record, may alone have 'impeached' him.' (*Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.*, 2 Cir., 1949, 175 F. 2d 77, 80.)" 251 F. 2d at 247-248, No. 28.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment in the District Court should be affirmed.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

ROBERT H. SCHNACKE,
United States Attorney.

MORTON HOLLANDER,
JOHN G. LAUGHLIN,
Attorneys,
Department of Justice,
Washington 25, D. C.

APPENDIX

APPENDIX

[Captions omitted]

Findings of Fact and Conclusions of Law

The above-entitled actions came on duly and regularly for consolidated hearing and trial on Monday, January 20, 1958, before the above-entitled court, upon the complaints of plaintiffs and the answer and amended answer of defendant the United States of America, the Honorable Willis W. Ritter presiding without jury. Plaintiffs Johnnie Elmease Madrigan and Fred J. Madrigan appeared in person, plaintiff Fred J. Madrigan appeared as guardian ad litem of plaintiffs Robert Edward Madrigan and Patricia Ann Madrigan, and all the plaintiffs appeared through their attorneys Melvin M. Belli, Esq., Lou Ashe, Esq. and Richard F. Gerry, Esq; and defendant the United States of America appeared by Lloyd H. Burke, United States Attorney for the Northern District of California, and James S. Higgins, Assistant United States Attorney. At the commencement of trial, upon motion of plaintiffs the court consolidated said actions for all purposes. Thereafter, evidence both oral and documentary was offered in evidence and received by the Court, and certain facts were stipulated to by the parties. The Court having heard all the testimony and all the evidence, said cause was thereafter argued by counsel, and it was thereafter duly and regularly submitted to the Court for its decision. Said cause was then considered by the Court and the Court thereupon made its order that judgment be entered herein, upon findings of fact and conclusions of law, in favor of defendant the United States of America,

The Court accordingly, being fully advised in the premises, now makes its findings of fact and states its conclusions of law as follows:

Findings of Fact

1. The complaints allege that these actions were commenced pursuant to, and that jurisdiction is founded

upon, the provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) et seq.

2. At all times mentioned in the complaints and herein, defendant the United States of America operated the United States Naval Hospital at Oakland, California, and United States Naval Hospital No. 3923 in Japan.

3. At all times mentioned in the complaints and herein, plaintiff Fred J. Madrigan was, and now is, a commissioned officer in the United States Navy, and his present rank is Commander.

4. On October 12, 1951, plaintiff Johnnie Elmease Madrigan, the dependent wife of plaintiff Fred J. Madrigan, went to the out-patient department of the United States Naval Hospital at Oakland, California, as an out-patient, complaining of very painful feet and fatigue.

5. On October 12, 1951, plaintiff Johnnie Elmease Madrigan was seen in the out-patient department of the United States Naval Hospital at Oakland, California by Dr. Robert F. Christoph, who diagnosed a condition of foot deformity known as hallux valgus and referred her to the orthopedic section of the out-patient clinic.

6. On October 24, 1951 plaintiff Johnnie Elmease Madrigan was seen as an out-patient by Dr. Charles A. Mead, an orthopedist at the United States Naval Hospital at Oakland, California, who noted certain deformities in her feet, recommended surgical operations on both feet, and directed plaintiff to return for the final decision upon the proposed foot surgery.

7. On October 24, 1951, at the United States Naval Hospital at Oakland, California, a routine pre-operative chest x-ray was taken by a technician of the chest of plaintiff Johnnie Elmease Madrigan because Dr. Mead, the orthopedist, thought Mrs. Madrigan might be admitted to the hospital for foot surgery.

8. On October 29, 1951 at the United States Naval Hospital at Oakland, California, plaintiff Johnnie Elmease Madrigan was seen again as an out-patient by Dr. Mead in consultation with the Chief of Orthopedics at said hospital, and it was decided that plaintiff would have no surgery at that time, that she should try foot baths and massage for her feet and change her shoes, and plaintiff was directed to return to said hospital in one month for a check on her progress.

9. A report of a reading upon said chest x-ray dated November 9, 1951, and signed by the radiologist who read the x-ray and made the report, J. G. Bulgrin, CDR, MC, USN, reads in part as follows:

“11-8-51 CHEST, PA—

On the left in the plane of the first two anterior interspaces and to a lesser extent in the apex there is fine spotting and semiconfluent infiltration which is not heavy. Its appearance suggests minimal fibrotic infiltration.

Elsewhere the lung fields show no infiltration and the heart and other structures are unremarkable.

IMPRESSIONS Minimal fibrotic appearing infiltration left upper lung field. Acid fast re-infection etiology must be considered first. Activity by single film study is not likely, but serial films over a fairly prolonged period are necessary to evaluate activity from a radiographic standpoint.”

10. Said chest x-ray film and a copy of said report of the said reading of said film were placed in the x-ray film files at the United States Naval Hospital at Oakland, California, and the original of said report was, on or about November 9, 1951 placed in the out-patient file or jacket maintained at said hospital for plaintiff Johnnie Elmease Madrigan.

11. The signs and shadows in said chest x-ray film which were the basis of said report of said radiologist of his said reading, were vague, faint and indefinite, and were questionable and inconclusive as evidence of any disease.

12. Plaintiff Johnnie Elmease Madrigan never returned to the United States Naval Hospital at Oakland, California, as directed on October 29, 1951.

13. Plaintiff Johnnie Elmease Madrigan made no inquiry with respect to the results of said chest x-ray and other studies until after May, 1955.

14. On May 13, 1955, plaintiff Johnnie Elmease Madrigan was admitted to United States Naval Hospital No. 3923 in Japan. Thereafter, a diagnosis was made that she had tuberculosis, pulmonary, bilateral, active, far-advanced.

15. On May 28, 1955, plaintiff Johnnie Elmease Madrigan was admitted to the United States Naval Hospital at Oakland, California. On June 13, 1955, plaintiff Johnnie Elmease Madrigan was admitted to Fitzsimons Army Hospital at Denver, Colorado. On November 2, 1955, plaintiff Johnnie Elmease Madrigan was admitted to the Parks Air Force Base Hospital in California.

16. On March 2, 1956, plaintiff Johnnie Elmease Madrigan completed her hospitalization at Parks Air Force Base Hospital in California, was discharged as an in-patient, and continued as an out-patient of said hospital.

17. Plaintiff Johnnie Elmease Madrigan is the mother of plaintiffs Robert Edward Madrigan and Patricia Ann Madrigan.

18. Sometime after May 13, 1955 there were indications of plaintiffs Robert Edward Madrigan and Patricia Ann Madrigan having been infected with tuberculosis.

19. On June 14, 1957, this court made an order appointing plaintiff Fred J. Madrigan guardian ad litem for plaintiffs Robert Edward Madrigan and Patricia Ann Madrigan.

20. Neither defendant the United States of America nor any employee of the Government was negligent or careless in the care, prescription, testing, treatment, diagnosis, examination, attention, or advice to plaintiff Johnnie Elmease Madrigan or in the operation and maintenance of said United States Naval Hospital at Oakland, California, or in any other respect.

21. No injury, disease, disability, or damage to plaintiffs, or any of them, was the result of any negligence or carelessness, or of any wrongful act or omission, in the manner in which defendant the United States of America and its employees operated and maintained said United States Naval Hospital at Oakland, California, or in any other respect.

22. None of the damages alleged or suffered, if any, by plaintiffs as a result of any injury, disease, or disability, were caused or contributed to by any negligence or carelessness, or any wrongful act or omission, on the part of defendant the United States of America or of its employees at the times and places and on the occasions alleged by plaintiffs in their complaints herein, or otherwise.

23. There was no negligence or carelessness, and no wrongful act or omission, on the part of defendant the United States of America or its employees, in any way connected with the matters alleged in the complaints herein and tried in this action, and at all times pertinent to the issues herein said United States Naval Hospital at Oakland, California was operated and maintained with that degree of skill and care and knowledge and prudence that is ordinarily possessed and reasonably exercised by professional men, mem-

bers of the medical profession, under all the circumstances of this case.

24. None of the incidents, matters, or things mentioned in the complaints or herein caused any injury, disease, disability, or damage to plaintiffs, or any of them.

25. None of the incidents, matters, or things mentioned in the complaints or herein or tried in this action concerning the operation, routine, maintenance, activities, acts, or alleged omissions, of said United States Naval Hospital at Oakland, California or of any Government employee caused any injury, disease, disability, or damage to plaintiffs, or any of them.

26. Whatever plaintiff Johnnie Elmease Madrigan's chest or lung condition was in 1951, as reflected in said October 24, 1951 chest x-ray film, such condition was not related to plaintiff Johnnie Elmease Madrigan's far advanced, active, bilateral, pulmonary tuberculosis in Japan in May, 1955.

Conclusions of Law

And as and for its conclusions of law the Court states as follows:

1. Neither defendant the United States of America nor any employee of the Government, was negligent or careless in the operation and maintenance of its United States Naval Hospital at Oakland, California at the times and places set forth in plaintiffs' complaints, or otherwise.

2. There was no act or omission on the part of defendant the United States of America or any of its employees imposing upon defendant the United States of America or any of its employees any liability or responsibility to plaintiffs, or any of them, on account of any injury, disease, disability, or damage to plain-

tiffs, or any of them, neither defendant the United States of America nor any of its employees caused or contributed to any injury, disease, disability, or damage to plaintiffs, or any of them, and there was no negligence on the part of defendant the United States of America or any of its employees that caused or contributed to any injury, disease, disability, or damage to plaintiffs, or any of them.

3. No act or omission of defendant the United States of America or any employee of the Government caused any injury, disease, disability, or damage to plaintiffs, or any of them.

4. Defendant the United States of America is not liable to plaintiffs, or any of them, or responsible to plaintiffs, or any of them, for any losses in respect of any injury, disease, disability, or damage to plaintiffs, or any of them, and no money or damages are due or owing by defendant the United States of America to plaintiffs, or any of them, on account of any injury, disease, disability, or damage to plaintiffs, or any of them.

5. Plaintiffs are not—and none of them is—entitled to recover anything from defendant the United States of America upon their said complaints or in this action.

6. Defendant the United States of America is entitled to judgment against plaintiffs, and each of them, in this action, together with its cost of suit incurred herein.

Let judgment be entered accordingly.

DONE IN OPEN COURT this 17th day of February, 1958.

/s/ WILLIS W. RITTER
United States District Judge

[Captions omitted]

Judgment

The above-entitled actions came on duly and regularly for consolidated hearing and trial on Monday, January 20, 1958, before the above-entitled Court, upon the complaints of plaintiffs and the answer and amended answer of defendant the United States of America, the Honorable Willis W. Ritter presiding without jury, and plaintiffs Johnnie Elmease Madrigan and Fred J. Madrigan appearing in person, plaintiff Fred J. Madrigan appearing as guardian ad litem of plaintiffs Robert Edward Madrigan and Patricia Ann Madrigan, and all the plaintiffs appearing through their attorneys Melvin M. Belli, Esq., Lou Ashe, Esq., and Richard F. Gerry, Esq.; and defendant the United States of America appearing by Lloyd H. Burke, United States Attorney for the Northern District of California, and James S. Higgins, Assistant United States Attorney; and said action having been consolidated for all purposes by order of the Court upon motion of plaintiffs at the commencement of trial; and evidence both oral and documentary having been offered and received by the Court, and certain facts having been stipulated to by the parties, and the Court having heard all the testimony and all the evidence, and thereafter counsel having argued said cause, and said cause having been thereafter duly and regularly submitted to the Court for its decision, and the Court having considered said cause and having thereafter ordered judgment in favor of defendant the United States of America and against plaintiffs, and each of them, and the Court being fully advised in the premises and having considered the same, and having made, signed, and ordered filed herein its findings of Fact and Conclusions of Law which are by reference made a part hereof; now, by reason of the law and the evidence and the premises, together with the Findings of Fact and Conclusions of Law as aforesaid, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiffs Johnnie Elmease Madrigan and Fred J. Madrigan, and plaintiffs Robert Edward Madrigan and Patricia Ann Madrigan, by and through their guardian ad litem Fred J. Madrigan take nothing from defendant the United States of America by this action and that judgment be entered against plaintiffs, and each of them, and in favor of defendant the United States of America together with defendant the United States of America's costs of suit incurred herein, in the amount of \$.

DONE IN OPEN COURT this 17th day of February, 1958.

/s/ WILLIS W. RITTER

United States District Judge

[Certificate of Service omitted]

Opinion by the Court

[Transcript, pp. 833-848] * * *

THE COURT: I want to discuss two or three of these things with you, because you have discussed them with me and I think you are entitled to know what my views are about them. It's easy enough for a judge, you know, to say, "Judgment for the plaintiff," or "Judgment for the defendant," and "Will you, counsel, prepare the findings and conclusions and judgment?" and walk out. Now, I don't do that. I think you ought to know what my thinking is about this.

Now, to start out with, I am going to pay a little attention to Dr. Bulgrin. And that statement of his that the chances were overwhelming that Mrs. Madrigan had tuberculosis in the upper left lobe of that lung on October 24, 1951.

Now, one of the jobs of the trial judge is to pass

upon the credibility of the witnesses and what they say. And I suggest to you that at the time Dr. Bulgrin said what he did about "overwhelming," I was sitting here with my eye on him, watching him. And Dr. Bulgrin relaxed, slumped down in his chair; it was the tale end of something he had been talking about, his attitude and manner of speech were such, and the character of his statement was such, that it seemed to me that that was a rather careless thing for a well-trained, experienced doctor to say. Now, I did some compliment in the record to Dr. Hinshaw's careful statement. I refer to that and adopt it again.

Dr. Hinshaw had the bearing and demeanor of a scientist and in what he said, he expressed himself with the careful attention to detail and the thoughtful attention to his phrases, to their meaning and extent. Now, without casting any uncomplimentary suggestion upon Dr. Bulgrin, I suggest to you that the testimony of Dr. Hinshaw in my judgment is the more credible.

Now, Dr. Hinshaw did not say anything about that being overwhelming in favor of T. B. He said exactly the opposite. He said they often saw in an x-ray film, such as that of October 24th, 1951, those shadows, and I copied down what he said at the time and I have my notes here. Dr. Hinshaw said those shadows were vague and questionable evidence of any disease. Dr. Hinshaw said those shadows were faint, indefinite and inconclusive, and he further said that shadows of this kind were often seen and often disappeared. When they would not know, or caused by they knew not what. He made a general suggestion that Dr. Bulgrin had over-read that film when he talked about acid fast etiology as emphatically as he did. I don't think it is too emphatic. He said this should be considered first.

Well, as between Bulgrin's statement with reference to overwhelming and Hinshaw's extremely careful statements, I must entertain the view that the testimony of Hinshaw is the more credible.

There isn't much in the testimony of the rest of the

doctors that is too far apart, really. Of course, they all agree now that that x-ray film of October 24th, 1951 should have been followed through. There should have been more tests, there should have been more films taken, there should have been sputum tests, and the like, stomach washings. There should have been an inquiry made. Now they say that. But it is impossible now to tell that she had then without paying a great deal of attention to her history since, and it is the history since that most of those doctors were impressed with. Hinshaw took a look at that film as though he were looking at it on October 24th, 1951, and he made the remarks about it that I have read to you. Hinshaw said he would not have read that 1951 x-ray as tuberculosis. He said he would not have read that as tuberculosis.

As far as I know, nobody else suspected tuberculosis in Mrs. Madrigan until May 13, 1955 in Tokio, Japan, when she was hospitalized for a far-advanced case of tuberculosis. The first x-ray taken since October 24, 1951, was taken on May 13, 1955. So this case boils down to a rather simple problem really, and that is, did anybody fail to exercise that degree of care and skill and knowledge which medical men in this field ordinarily, usually and characteristically exercise?

We will take a look at that, and look at all the facts and circumstances in it. See if we can't paint that picture with some broad strokes and fill in the details as we go. Mrs. Madrigan appeared at the Naval Air Dispensary over at Alameda, complaining about fatigue and about fatigue connected with her feet, and she is referred to orthopedics, and this is the best evidence of what she complained about, because they sent her over to orthopedics at the Oak Knoll Hospital. When she gets through with orthopedics at Oak Knoll, she talks to Dr. Meade and Dr. Meade says, "We ought to have some surgery on your feet, Mrs. Madrigan," and she readily consents to have it done, and Meade writes up the report and says, "I think this ought to

be done, but I think the Chief of Orthopedics is not going to agree with it." The upshot is that Meade orders pre-operative procedures to be done, so that in case they go through with the surgery, they will be ready to do it.

In orthopedics they take x-rays of her feet. They send her up to radiology and they take an x-ray of her chest, and then Mrs. Madrigan comes back on the 29th of October and she is told there is not going to be any surgery, they advise a less drastic treatment for feet. Now, that x-ray film of October 24th, 1951—where is it—where is it now? Did Meade ever see it? Did Meade ever see Dr. Bulgrin's reading of it? The only evidence about that matter one way or the other is circumstantial evidence and inference. There is no direct evidence that Meade ever saw that reading. There is no direct evidence that Meade ever saw that film, and there is no direct evidence in this record that any chest man ever saw that film. Bulgrin saw it, Bulgrin read it, and we have Bulgrin's reading of it. It seems to me to be the more reasonable conjecture, more reasonable inference, if you will, to suggest that when Meade and Cruise got up to the gun on October 29th, that is when Meade and Cruise to decide whether we are going to operate or we are not going to operate, they didn't get close to it. I think what happened Cruise took the point of view that Meade said in his report, that he was likely to take, that is a very reasonable thing to assume, that Meade knew his Chief, and when Meade says, "the Chief is not going to agree with this," I think we can assume that is exactly what happened. Cruise did not agree with it. Do you mean to say if Cruise did not agree with it as an ordinary procedure on feet that he and Meade sat down and nevertheless looked at that chest x-ray, if they had it, or looked at Bulgrin's reading of it, if they had it before them? That would be a wholly unnecessary thing to do. The chest x-ray was of no importance to them. They are not going to operate.

It seems to me the only man connected with that hospital and the Navy who saw that film and saw what was in it and wrote a report about it is Bulgrin. Now, I have been asking myself this question: what was Bulgrin's duty with respect to that film? Was it Bulgrin's duty as a radiologist to go hunt Meade up and say, "look here, Meade, look at what is in this film,"—was it his duty to look up Cruise? Was it his duty to ignore both of them and hunt up the chest man at Oak Knoll. Was it his duty to go over the head of Meade and Cruise and notify Mrs. Madrigan? Well, of course, the ordinary procedure is that the man who ordered the film, if he wants to see it, will come and get it, and Bulgrin's testimony was very illuminating about their practice there. Their practice was to put the thing in a file.

Now, Bulgrin did not give us any explanation really of the delay between October 24th and November 8th or 9th, and he did not give us any explanation of the two dates November 8th and November 9th. What he did was about November 8th and November 9th, it appeared to him there must be some mistake about these dates. He said he was willing to assume November 8th was the date of the report, because that is where he had told the secretary to put that date in all cases. This is a practice he remembered and he was specific about that. When November 9th comes along, nobody knows what that amounts to. I do not believe we can decide this lawsuit on picking up little variations from the normal in matters that really don't affect the issue very much.

The only issue in this lawsuit is, Was anyone in the employ of the United States of America negligent in relation to the October 24th, 1951 film? That is to say, was there anybody there at the hospital, medical man or otherwise, who failed to exercise that degree of skill and knowledge which professional men characteristically exercise in like circumstances? It seems to me rather far to go to complain that anybody was

lacking in the exercise of ordinary and reasonable care and prudence under these circumstances. If a chest man like Hinshaw or Shipman or the Hollander who was here—I forget his name—or Dr. Wilson, had put his eye on the film in the hospital in 1951 and then had not done anything about it at all, we would have had a different problem. But this radiologist Bulgrin, it seems to me, was exercising a high degree of care, skill and knowledge which he possessed, and which radiologists characteristically possess and exercise in like situations. He read the film, he put his reading down, and then the reading went where it was supposed to go, and the film went where it was supposed to go. It seems to me the only reasonable interpretation you can put on those facts—the fact is, we do not know what happened. We have to draw inferences from what we do know. It is my judgment that there was no failure in this case on the part of anybody employed by the United States to exercise that degree of skill and care and knowledge and prudence that is ordinarily possessed and exercised by professional men, members of the profession, under similar circumstances to these.

Dr. Hinshaw went further and said he would not expect a shadow of that faintness to explain any of her symptoms of fatigue and so on, and he said that at this time, that is, on January 22nd, 1958, it is impossible to tell if her condition reflected in the October 24th, 1951 film, had anything at all to do with the far-advanced case of tuberculosis with which she was suffering in Japan in May of 1955. Dr. Hinshaw says that the alcohol and the emotional misfortunes which the poor woman has suffered were the most important causes of her tuberculosis in his judgment.

We have Dr. Bulgrin, and Dr. Bulgrin only, it seems to me, in this evidence who had that film, had that reading, and one asks himself, “What ought Bulgrin to have done?”

Well, it is clear there was no reason outside ordi-

nary medical practice, ethics and the relationship between patients and physicians for Bulgrin to have done anything but what he did. He put the reading on the jacket or had his secretary do it. He sent the original along to the secretary of the Chief of the Orthopedic Section, and what happened to it nobody knows.

I think what happened was it became unimportant to the orthopedists because they had given up the idea of surgery. So they are doing something much less drastic, and it seems to me much more sensible, than that of drastic surgery. I am borne out in that thought by the fact that there is no evidence in this record that she ever did have surgery on her feet. That condition she is apparently getting along with. It must be tolerated because there are no further complaints about that.

So again we are borne out in the inference that in the good judgment of those two doctors they gave up surgery as a possibility, and having given it up as a possibility, there was no sense at all in worrying about the pre-operative procedure, including the examination of an x-ray film. So Bulgrin, was he to go down to Mead and tell him "Look here, Mead." That isn't their practice. No doctor has testified they do that. We know they don't. Do you suppose Bulgrin would go down to Cruise, the head of the Orthopedic Department, and say, "Look here, Cruise, you must pay some attention to this." Cruise would have thrown him out. That is not the way doctors operate in a hospital. Bulgrin's job was to read those x-rays up in radiology and put them where they were accessible to the physicians, where they could be obtained for future reference by anybody who was interested in them.

The operation on the foot having fallen through, Mead and Cruise were not interested in that any longer. That seems to me to be the plain fact in this case. It seems to me to be much more reasonable.

Was it Bulgrin's duty to hunt up the chest expert

and say, "Look, see what I found"? This was the 17,299th film. 17,299 films had been taken and read in that radiology department between the first of January, 1951, and October 24, 1951. Is it their duty, these radiologists, if they see something they suspect in a film to run around to see the specialist in the field and say, "Look here, have a look at that." Of course they don't. Bulgrin acted prudently, skillfully, it seems to me. He read it, put it in a jackaet, and filed it. I think that is what happened. Perhaps Bulgrin was right and perhaps he was not right in suggesting that maybe between October 24th and November 8th or 9th the orthopedists had that film down there, that is, before he read it. I don't know whether that is what happened or not. He said that might have been an explanation but he didn't know. He did know there was some mistake about those dates, November 8th and November 9th. It couldn't be both dates. He thought the 8th was more likely the date on which the report was made and typed.

Everything in this case comes down, it seems to me, to that October 24, 1951 film, and as far as the evidence in this case goes, nobody saw that except Bulgrin, and if Mead and Cruise were giving up the operation on the feet, there wasn't any need for them to look at that at all. It had no significance. In the first place, Mead is an orthopedist, Cruise is an orthopedist, and there is some testimony in this case that neither Mead nor Cruise is competent to read that film. The only thing they could have done was to read Bulgrin's report and then do something about it, if they ever saw that report. There is no evidence in this case that they did see the report. I think the evidence is against it, really, against seeing the report, against their seeing the film, because it seems to me to be a very reasonable assumption that they had decided not to operate and they did not pay any more attention to that chest film.

Mrs. Madrigan had not complained of t.b., of course; she had symptoms that Hinshaw and all of them say

showed fatigue, but it is the symptom of a lot of other things, too. There was no suggestion by anybody back in 1951 about tuberculosis. There was no chest expert in the case on Mrs. Madrigan either at the hospital or otherwise. Certainly no chest man saw the film over at Oak Knoll, unless you call Bulgrin a chest man. Bulgrin is a radiologist. Now, while I am paying some attention to the credibility of the testimony here, examine the high degree of qualification of Dr. Hinshaw, Dr. Wilson and Dr. Kruisheer as compared with the qualifications of Bulgrin. Bulgrin is to be commended for the reading he made of that film in 1951, but Bulgrin's qualifications do not stand up enough. Bulgrin is not operating in the same league as we sometimes say, as Dr. Hinshaw, a man who for 15 years was at Mayo's Clinic in this specialization and who is the head of the department in his specialization at Stanford with long experience, who has read thousands of films like this. Hinshaw said he just did not know what was in that film of October 24, 1951. He just did not know. He did say that if he saw it, he would want to tell the patient about it. He would want to do some further procedures. Of course, at this late date there is the history of a disastrous condition, and from this point of view that film of 1951 becomes all the more suspect.

I am troubled by the fact that Mrs. Madrigan did not return. Of course, Mrs. Madrigan did not know she had tuberculosis either, if she had it at that time. Nobody knows whether she did or not. But she did not return. Now, had she returned within a month as she was directed to do, perhaps that record would have been pulled out and somebody would have paid some attention to that film. But as it turns out in this case, with Mrs. Madrigan not returning, no doctor's attention invited to the thing—where was it? Well, I think it was filed away in Radiology. That is where it was, and it would be there until some doctor called for it. He wanted to examine it and discuss

it with her. She did not come around and call to attention any condition she had after that. She just did not return.

Mead and Cruise went along in that busy hospital doing their jobs. Bulgrin went along in that busy hospital doing his job. No chest man ever saw it. No chest man ever had any duty to see it. Well, it boils down to that in my judgment.

From the point of view of hindsight, looking at it now after the terrible illness this woman has sustained, we go back and point the finger at those vague, indefinite, inconclusive, faint, to use the word Hinshaw used, shadows in the film and say, "Well, this is what she had and it exacerbated in May 1955 or shortly before."

Something has been said about the duty to notify the patient. As I view this case, Bulgrin is the only fellow who saw that film professionally. Did he have any duty to call Mrs. Madrigan's attention to it? Of course not. There is a reference to him in Radiology from Mead. His job is to send it back to Mead, if anything, or make it available for him. He said it was not his job to send it back; it was his job to put it in a file, and if Mead wanted it he would send a corpsman for it or come for it himself.

Well, in my judgment, there is no negligence on the part of anyone connected with the United States or for whom the United States is responsible. And if there were lack of ordinary and reasonable care, skill, prudence, knowledge, I would have the greatest difficulty finding that that lack of skill, if any, was connected with the far-advanced case of active pulmonary tuberculosis this woman had in May of 1955. There isn't anybody now, even with hindsight, who can say what was in that chest of hers at that time with any reasonable degree of medical certainty—anybody.

Now, it is interesting to observe here that it is the younger ones, the least experienced, and those who haven't yet developed a very high degree of care in

their observations and statements, who go the farthest in this record. Hinshaw and Shipman seem to me to come very close to stating just about all one can state concerning this evidence. I prefer to take the view that the credibility of Dr. Hinshaw's testimony here is to be preferred to the credibility of Kruisheer, the credibility of Bulgrin and the credibility of Dr. Wilson.

Dr. Wilson is a splendid man, but he is a young man. He has a wonderfully fine educational background and a good deal of experience, but I was of the opinion and am now that Dr. Wilson made of himself something of an advocate in this case, and I don't suggest anything uncomplimentary to him or to counsel in that connection. He was just very enthusiastic about those films of his. I tried very hard, and of course I am unskilled in reading x-ray films, but I tried very hard to see what they were talking about and I think I saw it. And I suggested to Dr. Wilson while we stood down on the floor and examined that film, that there was only a faint distinction between what he said was normal in the right lung and what was abnormal in the left. I said, "That's such a faint difference," and he said, "Well, that's the thing about this disease—it's that a very, very faint little difference is of such horrible significance."

Well, "horrible" is a large word, and it seems to me a little reckless word to be using in these connections. I mention that as bearing upon the credibility in weighing credibility of Wilson and Hinshaw. You didn't find any words like that in Hinshaw's testimony. He is a very careful, scientific man. He weighed what he said with extreme care.

Well, I don't know that I can spell out any more fully what I have in mind. In short, there is no negligence, and if there were, I can see no connection between the negligence, if any, and what happened to Mrs. Madrigan. And it is unnecessary to go into the damages, therefore.

* * *